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No. 82-771

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNION OIL COMPANY OF CALIFORNIA AND
TOSCO CORPORATION, PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Department of Energy reasonably interpreted its statutory authority under the now-expired Emergency Petroleum Allocation Act of 1973, 15 U.S.C. (& Supp. V) 751 *et seq.*, so as to permit an orderly phase-out of the Tertiary Incentive Program following President Reagan's decontrol of crude oil prices.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 688 F.2d 797. The opinions of the district courts (Pet. App. 38a-54a, 72a-86a) are reported at 530 F.Supp. 717 and 532 F.Supp. 686.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1982. A petition for rehearing was denied on October 5, 1982. The petition for a writ of certiorari was filed on November 4, 1982. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, and 28 U.S.C. 1254(1).

STATEMENT

Following President Reagan's decontrol of crude oil prices in January 1981, the Department of Energy issued an interpretative ruling explaining that, inasmuch as the President's decontrol order had no retroactive effect on price controls, crude oil producers could, in conformity with long-standing regulations, adjust their prices for crude oil sold during the last two months of controls even though such adjustments might be based on costs incurred, paid and reported after controls had been removed. Petitioners contend that this interpretative ruling exceeded the scope of DOE's statutory authority insofar as it permitted producers to take advantage of a special program designed to encourage enhanced recovery techniques for two months following the expiration of price controls. As explained below, petitioners raise only a narrow issue of statutory construction that is of no continuing significance and that was, in any event, correctly decided by the court of appeals.

1. As oil fields are gradually depleted, producers are faced with the choice of either abandoning uneconomic wells or investing substantial funds to initiate enhanced recovery techniques, including "tertiary" methods to boost production from these wells. "Tertiary" techniques are generally high-cost production methods involving substantial risk of failure. In the mid-1970's, Congress recognized that such enhanced recovery techniques were of critical importance to the national objective of decreasing dependence on foreign oil.

Congress addressed this matter in 1976 by enacting an amendment to the now-expired Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. (& Supp. V) 751 *et seq.*, directing that the crude oil price regulations be amended to "provide additional price incentives for bona fide tertiary enhanced recovery techniques" (Section

122 of the Energy Conservation and Production Act (ECPA), Pub. L. No. 94-385, 90 Stat. 1133, 15 U.S.C. 757(j)(1)(A)). Pursuant to this congressional directive, DOE adopted a regulation, 10 C.F.R. 212.78 (1981), which provided that the volume of increased production of crude oil resulting from a qualified and certified tertiary recovery project would be exempt from price controls (43 Fed. Reg. 33679 (1978)). This regulation, by creating a new category of uncontrolled crude oil known as " 'tertiary incremental crude oil' " (Pet. App. 7a), was designed to encourage the development, expansion and continuation of tertiary recovery projects by permitting sale at free market prices of the increased production yielded by such projects.

After further study, DOE concluded that additional incentives were needed to assist those producers unable to finance tertiary projects unless some already-existing price-controlled crude oil could be sold at free market prices. Thus, on August 21, 1979, DOE amended 10 C.F.R. 212.78 (1981) to establish the Tertiary Incentive Program, which is the subject of this action (44 Fed. Reg. 51148 (1979)). The Program provided that producers could recoup up to 75% of certain specified expenses for tertiary projects by decontrolling sufficient volumes of price-controlled crude oil regardless of whether the project ultimately succeeded in increasing production.

For practical reasons, maximum allowable prices under the EPAA generally could not be determined until after the sales in a given month. Accordingly, producers were permitted up to two months after a sale in which to certify the category of crude oil sold (10 C.F.R. 212.131(a)(6) (1981)). Thus, as explained by the court of appeals (Pet. App. 8a-9a n.4), "the typical industry practice was to sell crude oil at an indeterminate price, with the understanding that the market price would be charged (*e.g.*, through retroactive invoicing) if the [producer was able to recertify the oil as tertiary

incentive] crude oil within the two months following the month of sale."

2. On January 28, 1981, President Reagan issued Executive Order No. 12287, 46 Fed. Reg. 9909-9910, which immediately exempted all crude oil and refined petroleum products from price and allocation controls. Approximately two weeks later, in response to industry and other public inquiries concerning the impact of Executive Order No. 12287 on the regulatory structure, DOE issued Ruling 1981-1 (46 Fed. Reg. 12945 (1981)). Answer # 7 of the Ruling (Pet. App. 95a) addressed the issues concerning a producer's ability to recover allowed tertiary expenses after January 28, 1981. DOE explained that, because the Executive Order did not have any retroactive effect on prices that could be charged for crude oil sold before January 28, 1981, a qualified producer could recover allowed expenses through the recertification of crude oil sold in December 1980 and January 1981, respectively, as long as the producer incurred, paid and reported those expenses prior to the end of the certification period on February 28 and March 31, 1981, respectively (*id.* at 95a-96a).

3. This litigation began in April 1981 when petitioners filed separate lawsuits challenging the validity of DOE's interpretation contained in Answer # 7 of Ruling 1981-1.[1] In *Union Oil Co.* v. *United States Department of Energy*, the United States District Court for the Central District of California held that Answer # 7 of Ruling 1981-1 was invalid because Executive Order No. 12287 terminated the operation of the tertiary incentive regulations, except as to those producers who incurred and paid tertiary expenses

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[1]Petitioner Tosco Corporation also challenged the procedural validity of the so-called "in-house" expense amendment to the regulations. The validity of that amendment, which was upheld by the court of appeals (Pet. App. 32a-36a), is not at issue here. See Pet. 7 n.19.

prior to January 28, 1981 (Pet. App. 38a-54a). With respect to the issue petitioners bring before this Court, the *Union Oil* district court held that Ruling 1981-1 was inconsistent with Congress' purpose in authorizing the Program, which, the court held, was "limited to correcting the disincentive to tertiary production that had inadvertently been created by the then existing price controls" and that existence of the Program after decontrol was unnecessary (*id.* at 47a, 66a-67a).

In *Tosco Corp.* v. *Department of Energy*, the United States District Court for the District of Nevada upheld the validity of Ruling 1981-1 (Pet. App. 72a-86a). The district court rejected the *Union Oil* court's finding that the operation of the tertiary incentive regulations did not survive the issuance of the President's decontrol order.

On September 1, 1982, the Temporary Emergency Court of Appeals of the United States reversed the *Union Oil* decision and affirmed that portion of the *Tosco* decision concerning Ruling 1981-1 (Pet. App. 1a-37a). Among other grounds, the court of appeals upheld the validity of Ruling 1981-1 as within the statutory authority granted by the EPAA. The court stated that "[b]y allowing tertiary expenses paid and reported between January 28 and March 31, 1981, to be recouped by releasing pre-decontrol oil to market prices, the Executive Order as interpreted by Ruling 1981-1 provided additional price incentives for tertiary projects. The Executive Order thus interpreted was consistent with the EPAA purpose of providing 'additional price incentives for bona fide enhanced recovery techniques' " (*id.* at 27a).

ARGUMENT

1. The decision below, construing the consistency of an agency interpretative ruling concerning a program that expired nearly two years ago with a statute that has likewise

expired, raises no issue of general importance warranting this Court's review. Petitioners do not even attempt to show that the court of appeals' decision has any continuing significance; instead, they argue that review by this Court is necessary because "the decision below undermines the role of the judiciary in assuring that agencies respect the boundaries established by Congress" (Pet. 9). But the principles governing judicial review of agency interpretations of statutes have long been settled: (1) the courts show "great deference to the interpretation given [a] statute by the officers or agency charged with its administration," *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), and (2) an agency's ruling will be upheld if it "was a reasonable choice of possible interpretations by the responsible agency. It is not required that the interpretation be the only reasonable choice." *Energy Consumers & Producers Association, Inc.* v. *DOE*, 632 F.2d 129 (Temp. Emer. Ct. App.), cert. denied, 449 U.S. 832 (1980).[2] The court of appeals applied these standards (Pet. App. 21a-22a, 36a), and there is thus no need for further review by this Court.

2. In any event, the decision below, rendered by "a court intimately familiar with the intricacies of federal energy regulation" (*Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982)), is correct. Petitioners erroneously claim (Pet. 11) that the court of appeals "turned the legislative scheme on its head" by ignoring the true intent of Congress in authorizing the Tertiary Incentive Program. In petitioners' view,

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[2]Even greater deference is accorded agency interpretations of administrative regulations and executive orders. *Udall* v. *Tallman, supra*, 380 U.S. at 16 n.; *University of Southern California* v. *Cost of Living Council*, 472 F.2d 1065, 1068 (Temp. Emer. Ct. App. 1972), cert. denied, 410 U.S. 928 (1973). In the courts below, petitioners contended that Ruling 1981-1 conflicted with Executive Order No. 12287 and DOE's own regulations governing the Tertiary Incentive Program. The court of appeals rejected petitioners' claims (Pet. App. 22a-25a, 27a-30a), and petitioners have now abandoned those contentions.

Congress authorized tertiary incentives *solely* to alleviate the adverse effects of price controls on tertiary investments and, therefore, impliedly required that those incentives be terminated immediately upon decontrol even with respect to crude oil sold under price controls (Pet. 14-15). Petitioners' argument disregards the unambiguous language of the statute and rests upon a distorted view of its legislative history.

Nothing in the language of the statute suggests that Congress' *sole* concern was with the correction of disincentives to tertiary projects. On the contrary, the plain language of the statute directed amendments to the price control regulations for the express purpose of providing "*additional* price incentives for bona fide tertiary enhanced recovery techniques" (15 U.S.C. 757(j)(1)(A) (emphasis added)). The court of appeals found that Ruling 1981-1, by allowing the tertiary incentive regulations to run their normal course for the two-month period after decontrol in order to allow producers the opportunity to charge market prices for crude oil sold before decontrol, achieved the statutory goal of providing additional price incentives for tertiary projects, as Congress had intended (Pet. App. 27a).[3]

In concluding that Ruling 1981-1 was consistent with the express purpose of the statute, the court of appeals followed established judicial precedent. It is well settled that the most persuasive evidence of the purpose of a statute is the language of the statute itself. See, *e.g.*, *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940); *United States* v. *Missouri Pac. R.R.*, 278 U.S. 269 (1929).

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[3]This conclusion was based on DOE's determination, following a notice-and-comment rulemaking, that the tertiary incentive regulations had in fact accomplished the statutory goal of encouraging tertiary activity, which should result in increased domestic crude oil production that otherwise would not have occurred (Pet. App. 27a). Petitioners have never challenged this finding.

Thus, the court of appeals correctly recognized that "[w]here the language of the enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." Pet. App. 26a n.22, quoting *Church of Scientology* v. *Department of Justice*, 612 F.2d 417, 429 (9th Cir. 1979). See also *Howe* v. *Smith*, 452 U.S. 473, 483 (1981) (when terms of a statute are unambiguous, judicial inquiry is complete, except in " 'rare and exceptional circumstances' "); *Rubin* v. *United States*, 449 U.S. 424, 430 (1981) (same).

Notwithstanding the unambiguous language of the statute, petitioners argue that the legislative history of the tertiary incentive amendment to the EPAA demonstrates that Congress intended solely to correct the disincentives to tertiary investments caused by price controls. This erroneous and unreasonably narrow view is based on selective portions of the legislative history quoted by petitioners (Pet. 12-14).

In fact, the legislative history as a whole demonstrates that Congress intended to provide additional incentives for tertiary investments *by means of*, rather than simply *because of*, the existing price control structure. For example, in his closing remarks, Senator Montoya, on whose statements petitioners rely so heavily (Pet. 12-13), stated (122 Cong. Rec. 18492-18493 (1976) (emphasis added)):

> [T]he only way that we can stimulate production and draw more secondary oil through these new methods is by providing an incentive. *The only incentive that we can arrive at is to give the industry the power to do this with an advanced price structure.*

The Conference Report affirmed the objective of providing additional price incentives for enhanced recovery techniques by means of the existing price structure (S. Conf.

Rep. No. 94-1119, 94th Cong., 2d Sess. 71 (1976) (emphasis added)):

> There is also general agreement that *current economic circumstances would permit adjustments to the pricing mechanism* contained in the Energy Policy and Conservation Act *to give needed additional incentives* for the application of high-cost enhancement techniques which today are not economical. * * * [T]he conference substitute seeks to obtain *the objective of providing additional price incentives for high-cost enhancement techniques by equipping the Administration with greater flexibility to provide for such incentives within the framework of the existing price regulatory structure.*

Thus, petitioners' contention that Congress' sole objective in enacting the tertiary incentive amendment was to correct the adverse effects of price controls is not supported by either the language of the amendment itself or its legislative history. At most, the portions of the legislative history quoted by petitioners demonstrate the existence of differing views concerning the obstacles to tertiary investments.[4] They do not show any conflict over the ultimate purpose of the amendment—to encourage investments in tertiary projects.

Finally, even assuming that petitioners' limited view of the statutory purpose behind the Tertiary Incentive Program is correct, Ruling 1981-1 was consistent with, and indeed advanced, that purpose. The operation of the tertiary incentive regulations for two months after decontrol

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[4]In the preamble to the final regulations establishing the Tertiary Incentive Program, DOE identified the "two most significant impediments" for investment in tertiary projects: (1) the high risk involved, and (2) the relatively low technological level of many enhanced oil recovery techniques. 44 Fed. Reg. 51148 (1979). The preamble did not even mention price controls as a major "impediment."

served to "correct disincentives" to tertiary production caused by price controls, because it allowed market prices to be charged for crude oil sold during the period of price controls and therefore encouraged early initiation of tertiary activity that directly related to crude oil sold when price controls were in effect.

Acceptance of petitioners' position would create a bizarre anomaly during the last two months of price controls. Petitioners would subject crude oil sold during that time to controlled prices even though oil sold earlier would have been recertified as tertiary incentive oil and sold at market prices and oil sold later would have been uncontrolled oil and sold at market prices. This result would not have "let the market work" (see Pet. 13) with respect to sales of crude oil during the last two months of controls, but would have had the adverse and anomalous effect of depriving crude oil producers of vital revenues that could never be recovered. Not only would new projects have been cancelled, but existing projects would have been seriously affected. See 46 Fed. Reg. 36103 (1981). Whether one views Congress' purpose as providing additional incentives or as removing disincentives, it cannot be said that it was ever Congress' intent to require the President and DOE to carry out decontrol in a manner that would *impose* disincentives on tertiary investments. Yet this is the precise result that would occur if petitioners' view were to prevail.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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